IN RE ARBITRATION BETWEEN:

UNITED BROTHERHOOD OF CARPENTER, JOINERS AND CABINETMAKERS, LOCAL 1865

and

GOEBEL FIXTURE COMPANY

DECISION AND AWARD OF ARBITRATOR

FMCS CASE 060817-58898-7

JEFFREY W. JACOBS

ARBITRATOR

March 16, 2007

IN RE ARBITRATION BETWEEN:

United Brotherhood of Carpenters
and Joiners and Cabinetmakers, Local 1865,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE 060817-58898-7
Dianne Nelson grievance matter

Goebel Fixture Co.,

APPEARANCES:

FOR THE UNION:

Roger Jensen, Jensen, Bell, Converse & Erickson,
Bruce Nelson, Union Steward
Don Kern, Business Representative

FOR THE EMPLOYER

Kelly Berens, Berens & Tate
Robert Croatt, President of Goebel Fixture Co.

PRELIMINARY STATEMENT

The above matter came on for hearing on December 19, 2006 at the Arbitrator's office at 7300 Metro Blvd Edina, MN 55439. The parties presented testimony and documentary evidence at that time. The parties also submitted written post hearing Briefs dated February 20, 2007 at which point the record was considered closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from June 1, 2005 to May 31, 2010. Article 5 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The Parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

The parties stipulated to the issue as follows: Whether the attendance policy promulgated on June 2006 is reasonable? If not what shall the remedy be?

PARTIES' POSITIONS

UNION'S POSITION

The Union took the position that the attendance policy promulgated in June of 2006 is not reasonable as required by the terms of the Collective Bargaining Agreement and should be overturned by the arbitrator. In support of this position the Union made the following contentions:

1. Article 11, section 12 of the collective bargaining agreement gives the Company the right to promulgate "reasonable attendance … rules by which all employees must abide." The Union asserted that the attendance rules effective June 1, 2006 are unreasonable.

2. The new rule treats each day of an employee's illness as one "occurrence" under the attendance policy. Seven such occurrences and the employee can be terminated under the new rules. The Union asserts that it is per se unreasonable to terminate an employee for a legitimate illness but that is precisely what this policy now does.

3. The Union argued that the Company's assertion that this policy "falls within standard attendance policy language that is most common in businesses today" is simply unfounded. In fact on cross-examination, the Company was able to point to only one other business, and even then by hearsay only, that have a policy similar to this. The Union asserted that the Company president was not able to cite a single Company that had a similar policy. See tr. at 127-128.

4. The Union asserted that the Company's new policy is well outside of the "norm" for similar businesses and that these other establishments do not in fact have anything like this that would treat a day of illness as an occurrence that would otherwise count toward termination of an employee. The Union cited several other businesses that do not have a policy like this while the Company was not able to cite to a single Company that had one like this. The Union business agent testified that he has 28 contracts and that none of them have a provision in an attendance policy like this.

5. The Company's work rules prior to June 2006 called for an absence of more than 3 days for the same reason to be counted as one "occurrence" for purposes of imposing discipline. The June 2006 rule now calls for each day (more than 2 hours) to be counted as a separate occurrence. The Union argued that this policy essentially requires employees to work while they are sick to avoid a legitimate sick day from being counted as an occurrence that could well result in termination. The Union further argued that the nature of the work is dangerous and that if the employees are not 100% they could be injured, cause damage to the machines, slow or delay production and cause injuries to others. The Union argued that the policy now calls for termination for only 7 days of absence, which it alleges could easily be reached without the employee being able to use FMLA leave and would either force them to use vacation time or to work sick – neither of which is reasonable.

6. The Union countered the Company's assertion that absences have dropped since the implementation of this new policy and argued that the Company's statistics are skewed. The Union noted that the actual number of employee's dropped as well due to a slow down in workload over the past few years. The Union argued that as the number of employee's drops so too did the number of overtime hours. The Union further asserted that there is a correlation between the number of overtime hours worked and absences. Here it is apparent that the number of overtime hours, as well as the overall work force has dropped considerably over time, and a corresponding drop in absences could be expected. Accordingly, the Union asserted that one cannot say that the drop in absences is the result of a cause and effect relationship to the new absenteeism policy.

7. The Union argued most vehemently that the statistics are not material since the very nature of this policy is Draconian, to use the Union's words. The most common scenario is one where an employee, or someone in his or her family such as a small child, might come down with a severe cold or flu and be absent due to this legitimate illness for several days.

8. Obviously, day care and schools do not take sick children and the parent is required to stay at home with a small child. If that were to occur the affected employee would likely not be able to take FMLA leave since that illness may not fall easily into a "serious medical condition" as required by FMLA. See 29 CFR 825.114, defining "serious medical condition" for purposes of the FMLA. Thus, contrary to the Company's assertion, there is no easy escape valve for such a situation. That employee may well have each day of absence due to a legitimate illness count toward termination under the new policy and be terminated because their child got sick and had to stay home from school or daycare. This simply cannot be what the policy was intended for.

9. Finally, the Union asserted that the new policy was implemented in order to "back door" a PTO policy that was discussed but which the Company was unable to implement in negotiations. By doing this, it is obvious that the new policy is little more than a subterfuge to force employees to use PTO time to cover these illnesses. The Company should not be allowed to gain through the implementation of an unreasonable policy what it failed to again through negotiations.

10. Thus the essence of the Union's argument is that the new policy requires that each day of absence is to count toward possible termination – an event that happens if the employee misses more than 7 days in a year. This is neither the "norm" among Minnesota businesses nor was there any showing of any other businesses that have a similar policy to this. Further, the Company's statistics are skewed and irrelevant. The Company is simply attempting to get a new PTO policy, which it failed to get in negotiations through the back door with the implementation of this policy.

The Union seeks an award of the arbitrator sustaining the grievance, declaring that the new attendance policy is unreasonable and of the arbitrator to declare that an occurrence must be at least one or more consecutive days for the same reasons and to declare that for termination to occur there must be at least 10 such occurrences in a year.

EMPLOYER'S POSITION:

The Company's position was that there was no contract violation and that the attendance policy is reasonable and should be left in place. In support of this position and Company made the following contentions:

1. The Company pointed out that prior to 2005, employees could take up to 84 hours of unpaid time off without incurring any discipline. This was a major issue and caused production delays and was unacceptable to the Company. As a result of the 2005 negotiation, the 84-hour policy was eliminated and a policy was implemented in November 2005. That policy called for termination after 7 occurrences. An occurrence was defined as an absence of 1 to 3 days and was also assessed at ½ an occurrence if the employee was late or left 2 hours early from work.

2. The Company pointed out that the Union agreed that the 2005 policy was reasonable and that the Company had the right to implement it. The Union also agreed that the policy that went into effect in November of 2005 was liberal and even predicted that absences would increase because of it. The prediction turned out to be correct.

3. The Company pointed out that while single day absences went down, multiple day absences shot up nearly 80% following the implementation of the November 2005 policy. The Company provided evidence that when Friday vacations were denied due to workload needs the employee simply took 3 sick days off and accepted one occurrence under the 2005 policy. The Company argued that something needed to be done in order to address the abuses of the policy by the employees. The Company further asserted that the Union was well aware of the abuses and the need to address them by changing the policy. See, Tr. at page 65 and 66.

4. The Company then changed the policy in the following material respects: assessment of one occurrence per day of absence, as opposed to 3 days of absence; assessment of ¼ an occurrence for a tardy of up to one hour and ½ occurrence for between 1.1 and 2 hours of tardy. This latter change was actually more lenient than the prior policy. The policy retained the provision calling for discharge after 7 occurrences within a rolling calendar year.

5. The Company also changed its vacation policy at the same time to provide more flexibility in scheduling vacations. Under the old policy, employees could take only multiple days off and were required to give either a 3 or 14-day notice. The new policy eliminated this requirement and allowed an employee with an unexpected absence to cover it with vacation and not incur any "occurrences" under the new policy. The Company argued that this was done to help employees avoid chargeable occurrences under the new attendance policy.

6. As the result of these changes the Company pointed out that multiple day absences decreased dramatically and that even single day absences dropped slightly as well.

7. The Company argued that the measure of reasonableness does not depend on whether other businesses are doing the same thing or not. What is reasonable for one Company may not be for another. As such, the Union's attempt to show that this policy is not reasonable simply because many other Companies in the State of Minnesota are doing things differently is immaterial. The Company cited *Federal Home Products,* 92 LA 898 (Robinson 2005) in which the arbitrator ruled that "the basic standard of reasonableness of a unilaterally promulgated work rule is whether it is reasonably related to the legitimate business interest of management, without imposing undue hardships on employees." See also, *Stroh Die Casting*, 72 LA 1250 (Kerkman 1979) and *Chanute Manufacturing*, 101 LA 765 (Berger 1993).

8. Here the Company asserted that this new policy is absolutely related to the legitimate need to reduce absences and the abuse of the old policy and that it did exactly that. Moreover, not a single employee has been disciplined under the new policy since its implementation. The Company distinguished this case from the situation presented in Avery Dennison Corp, 119 LA 1170 (Imundo) where the arbitrator did find the attendance policy unreasonable. There the employees were required to give 24-hour advance notice of the use of sick leave, an almost impossible task in the event of an unexpected illness. There was no way to avoid an occurrence in that scenario and many employees were disciplined under the policy for that very reason. Here there is a way to avoid occurrences and no employees have been disciplined under the new policy.

9. The essence of the Company's case is thus that there was a problem that needed to be addressed, i.e. the abuse of the 2005 policy. The Company made changes to address this problem in order to meet its legitimate needs and to prevent the abuse that was clearly going on. Finally, that these changes were not unduly harsh to employees and provided ways to avoid occurrences under the new policy. In fact the new policy is even more lenient and favorable to employees than the old policy was in several ways. The results were marked and very positive – multiple day absences dropped and so far no employees have suffered any adverse consequences as the result of the new policy.

The Company seeks an award of the arbitrator denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

The facts regarding the promulgation of the attendance policy under consideration are relatively straightforward and for the most part undisputed. The contract states at Article 11 that "the Company will have the sole right to establish, revise or add reasonable attendance, … rules by which all employees must abide … The Company rules and/or disciplinary policy will become effective seven (7) days after they have been posted in the workplace and the Union has been notified." The evidence showed that the procedural requirement of 7 days of posted notice was met in this case. The issue is therefore whether the attendance policy promulgated in June of 2006 was "reasonable."

The Company promulgated an attendance policy in November of 2005. The Union did not then and does not now dispute the right of the Company to do this and did not object to any of the provisions of the 2005 Policy.

The operative portions of this policy were as follows:

> "Absence: Any time away from work for any reason for more than two (2) hours including any scheduled overtime.
>
> Tardy: Any time after the scheduled stating time up to two (2) hours late for work.
>
> Leaving early: "Leaving work early with less than two (2) hours remaining including overtime. Leaving work early will be counted as a tardy. Provided time off is approved, if an employee requests to leave a shift early at least three (3) days in advance and takes four (4) hours of vacation.
>
> No Call/No show: Failure to contact a floor supervisor within sixty (60) minutes after the scheduled start of your shift or failure to report for work for scheduled shift. Voice mail messages will not be considered a contact. THE CALL NUMBER IS (Call number is given in the policy).
>
> Disciplinary actions are listed below:
>
> - Two tardies will equal one (1) occurrence (each tardy is ½ an occurrence).
> - An absence from work of one to three consecutive days for the same reason will count as one (1) occurrence.
> - A verbal warning will be issued after four (4) occurrences in a rolling calendar year.
> - A written warning will be issued after five (5) occurrences in a rolling calendar year.
> - A one (1) day suspension will be issued after six (6) occurrences in a rolling calendar year.
> - Seven (7) occurrences in a rolling calendar year will result in termination.
> - The first no call no show will result in a final warning. A second no call/no show will result in termination."
>
> Time away from work that is not counted as an occurrence is listed below:
>
> - Vacation, Holidays, Jury Duty, Military Leave, Funeral Leave, Union leave and FMLA.

The evidence showed that the provision calling for an occurrence to be counted for any absence of up to 3 days led to some abuse by employees. Multiple day absences, especially 3-day absences rose considerably after the implementation of the 2005 policy. The evidence further showed that this was generally known around the plant and that the Union was well aware of it as well.

In April of 2006 the Company announced that it would implement a new policy. The new policy was implemented on June 1, 2006. The operative provisions of this policy were as follows:

> "Any time an employee is not in the building during his/her scheduled work day, the employee will be charged with an occurrence as follows:
>
> - Up to one (1) hour = ¼ occurrence.
> - 1.1 – 2 hours = ½ occurrence.
> - 2.01+ hours = full occurrence
> - Each day (more than 2 hours) that an employee is absent form work will count as one full occurrence
>
> No Call/No show: Failure to contact a floor supervisor within sixty (60) minutes after the scheduled start of your shift or failure to report for work for scheduled shift. Voice mail messages will not be considered a contact. THE CALL NUMBER IS (Call number is given in the policy).
>
> Disciplinary actions are listed below:
>
> - A verbal warning will be issued after four (4) occurrences in a rolling calendar year.
> - A written warning will be issued after five (5) occurrences in a rolling calendar year.
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> - Seven (7) occurrences in a rolling calendar year will result in termination.
> - The first no call no show will result in a final warning. A second no call/no show will result in termination."
>
> Time away from work that is not counted as an occurrence is listed below:
>
> - Vacation, Holidays, Jury Duty, Military Leave, Funeral Leave, Union leave and FMLA.

Several of the provisions were actually more lenient and favorable to the employees. The provision the Union objects to however is the provision calling for each day of absence to be counted as one occurrence. The evidence showed that this provision was inserted as a direct consequence of the abuses of the 2005 policy and to deal with the increase in absences for multiple days.

Company exhibit 5 provided a good comparison of how these policies differed. The evidence showed that the only negative difference for employees was the provision that calls for each day being counted as one occurrence under the policy. Most of the provisions were the same and others were actually more favorable for employees.

The evidence further showed that thus far, no employees have been disciplined under the 2006 policy and that absences on multiple days have dropped dramatically. See Company exhibits 3 and 4. Under the 2005 policy, multiple day absences were frequent and there was an unusual frequency of multiple days around weekends and holidays. See, Company exhibit 2.

The Union argued that the stated reason for the implementation of the new policy was unsupported by the evidence. The Company made a statement in its denial of the grievance in this matter that "The Company feels that the rules that became effective June 1, 2006 fall well within standard attendance policy language that is most common in businesses today and therefore it is our contention that the policy is reasonable. See Union exhibit 4, Memo dated June 5, 2006.

The Company was unable to provide any evidence of other businesses with the same or similar attendance policies. There is thus a paucity of evidence on this record to support the Company's contention that this is somehow a standard provision in most businesses.

The Union provided a sampling of other Companies in the State of Minnesota that have dissimilar provisions. See Union Exhibits 6 a through j. At first blush, it appeared that the Company's answer was essentially baseless and it was clearly not perhaps the best answer it could have provided to the Union in response to this grievance. However, the issue is whether the policy is 'reasonable" under these facts and circumstances and as applied to this Company and these employees. The question of whether other Companies do it too is not the end of the inquiry. The essential issue here is whether the policy as drafted is unreasonable on its face.

The Union also raised an issue that the implementation of the new policy was in direct response to the Union's objection to the Company's proposed PTO language. See, Tr. at page 25 and at 140-144. A review of the evidence as a whole in this matter did not support the claim that the 2006 policy was made in response to the PTO question. There were discussions about PTO and the Union membership rejected the Company's proposals for changes in the PTO program.

On these facts there was insufficient proof that the 2006 policy was in fact a back door way to essentially get the PTO language without having to negotiate for it. Had there been a greater showing of that the result here might well have been different for the reasons stated by the Union in its Brief. The evidence as a whole did not establish that the PTO issue was directly tied to the attendance policy.

As noted above, the issue for determination is whether the attendance policy promulgated on June 2006 is reasonable. Elkouri discusses the rules governing attendance policies and how various arbitrators have analyzed this very question and states as follows:

> "Management has the right to establish unilaterally reasonable rules governing attendance. However, attendance policies that disregard all excuses, including personal or sick days to which employees are contractually entitled, or that treat all categories of absence as carrying equal weight, have been struck down as unreasonable. …
>
> A number of Companies have adopted no-fault attendance polices, which provide for discipline and discharge because of excessive absenteeism regardless of the reasons for the absences. Such polices are considered legitimate when implemented to improve and control the attendance of employees, especially where there has been excessive absenteeism.
>
> A no-fault attendance policy allows the Company to terminate an employee automatically once they have been on leave or absent for a predetermined number of days. The typical no-fault policy involves the accumulation of 'points,' 'incidents,' occurrences,' or 'occasions' for absences, which results in a progressive disciplinary action. Many arbitrators find that no-fault attendance polices are reasonable, but there is disagreement among arbitrators as to whether the just cause standard applies to discipline issued under the policy." Elkouri and Elkouri, How Arbitration works, 6th ed. at page 774-775.

See also, *Chanute Manufacturing*, 101 LA 765 (Berger 1993) where the arbitrator struck down the part a no-fault attendance policy that eliminated a rolling period to remove stale absences but left intact the provisions on limits for personal days off. Here there is a rolling one-year period whereby stale absences drop off the "occurrences" list.

Here the question of whether the just cause standard applies is not involved. As will be discussed below, there may well be a legitimate question of whether the just cause standard applies to somehow alter the strict provisions of the no-fault policy to support disciplinary action in a particular case. That is of course not at issue here. The question is whether this policy is per se unreasonable given the language regarding occurrences and should therefore be struck down on that basis.

Moreover, there is no issue here regarding whether "all excuses" are disregarded. The evidence and the contractual language support the Company's view on this that the employees have options under this policy. A review of the contract does not reveal that the terms of the policy as drafted fundamentally alter the employment relationship nor does it show that its terms are inconsistent with any of the other provisions of the labor agreement. The Union did not point to any.

The Union's point is that the stated reason for the implementation of the policy as that "other" Companies do this too and that the Company was not able to show which, if any, other Companies in fact have policies like this. The evidence shows that this was not the sole reason for the implementation of the June 1, 2006 policy. It was largely to deal with the abuses of the 2005 policy and to curb the excessive absences that were occurring under the 2005 policy as well.

The Union also cited to an article on no-fault policies written by Arbitrators Block and Mittenthal and edited by Professor Walter Gershenfeld and presented to the National Academy of Arbitrators in 1984, Arbitration 1984, Absenteeism, Recent Law, Panels and Published Decisions, proceedings of the 37th Annual Meeting of the National Academy of Arbitrators, BNA, 1984. In it Block and Mittenthal describe in some detail the concept of no-fault attendance policies, that were incidentally beginning to crop up in the work place at about that time. The authors describes some of the deficiencies of more traditional attendance policies and describes the response to those as the so-called no-fault attendance policy are what their name implies. The authors note as follows:

> "They provide fixed disciplinary standards for excessive absenteeism regardless of whether the absences are the employee's fault. They thereby eliminate the distinction between excused and unexcused absence."
>
> Most plans, at least those that have been approved by arbitrators, contain the following common denominators. First, a specific number of absences is allowed before discipline is imposed. Second, certain types of absence are excused and are not counted against the employee. Examples of this are absence due to industrial injury, jury duty, and authorized leave time. Third, a full range of progressive discipline is employed for absences beyond a certain number. The penalties become more severe, from warnings to suspensions to discharge, for each successive absence. Fourth, the employee can "cleanse" his record periodically by perfect attendance. The reward for a month without absence, for instance, is to move the employee to a lesser level in the progressive discipline procedure. Block and Mittenthal at page 94-96.

This plan contains these elements. The policy contains a specified number of absences before discipline is imposed, this advising the employees of the consequences of missing work. There is a provision allowing certain types of absences to be excused and thus not counted toward "occurrences" under the plan. There is a progressive discipline plan in place and finally, there is a way for employees to "cleanse" their records, in the words of Block and Mittenthal, after a specific period of time. Here the attendance does not even need to be perfect since stale absences are taken off the list after a rolling calendar year.

They further go on to discuss the reasonableness or unreasonableness of these polices and provide a framework for determining how that might be measured as follows:

> "Collective bargaining contracts permit management to establish 'reasonable' rules for employee conduct. Many Companies exercise this right and promulgate rules to govern excessive absenteeism. … Such rules can withstand Union challenge because it cannot be seriously argued that Companies do not have a legitimate interest in curbing 'excessive' absenteeism."
>
> "Some Companies go further. They introduce a no-fault plan which defines 'excessive' absence and triggers discipline automatically at fixed levels of absenteeism without regard to fault. The Union objects to the plan. The resulting dispute turns on the question of whether the plan can meet the test of reasonableness." Gershenfeld at page 98.

They then discuss a plan with very similar provisions to the one at issue here and notes that some arbitrators find these to be unreasonable but that they are in the minority. One line of reasoning focuses in the anomaly of two employees one of whom is absent for legitimate health related reasons and another who simply blows off work a lot but has one less day of absence than the first employee. The former is disciplined while the latter is not.

They further discuss another line of reasoning that finds an inherent inconsistency between these sorts of no-fault systems and the just cause test for determining discipline. Despite objections from some arbitrators, Block and Mittenthal note that the majority of arbitrators do find these types of policies to be reasonable.

> "They approach the problem from a highly pragmatic point of view. They stress the damage caused by absenteeism, the need for objective attendance standards and the actual experience under the plan. They have given considerable weight to proof by the Company that the plan has been reasonable in operation or to the absence of proof by the Union that the plan has worked a hardship in particular cases. This rationale is perhaps best summarized in the following words by Arbitrator James Duff: 'If a plan is fair on its face and its operation in the concrete cases at hand produces just results, and other common tests of reasonableness are satisfied, a plan ought not to be declared invalid based on the mere existence of some remote possibility that it could operate perversely in the indefinite future under hypothetical circumstances which have not as yet materialized.'" (Citing *Robertshaw Controls Co.*, 69 LA 77 (Duff 1977). Block and Mittenthal at page 101.

Applying these principles to the case at hand it is apparent that the policy itself is on its face reasonable. It provides for a drop-off of stale occurrences on a rolling calendar year basis. It is, as noted above, somewhat more lenient in some ways than its predecessor, which the Union did not object to. The contract provides for several other ways to deal with absences, such as vacation and FMLA to name some examples. Also, as noted above, the evidence showed that abuse did occur under the old policy and that the Company had a legitimate interest in fixing that problem. Finally, no discipline has been meted out under this policy so there was no evidence to show that the policy as applied on these facts was unreasonable.

The Union's main concern was that there could be at some point in the indefinite future under hypothetical circumstances which have not as yet materialized a situation wherein the application of this policy may be seen as unreasonable. That case will have to await a future set of facts and it may well be that the just cause standard might mandate a different result than is called for under the strict terms of the policy. That is not the issue here and no determination is or can be made on that question. As Block and Mittenthal state at page 103 of their article: "Thus, all parties concerned with no-fault plans appear to acknowledge that a plan considered reasonable may occasionally produce unreasonable results that should be mitigated." The very fact that at some point this policy might possibly be interpreted in a fashion that may be regarded as harsh or even unreasonable does not render this policy unreasonable on its face now.

Finally, the Company cited several arbitral decisions to demonstrate no-fault policies that have been found to be reasonable and to provide a framework for analyzing their reasonableness. In *Stroh Die Casting*, 72 LA 1250 (Kerkman 1979) the arbitrator found a no-fault policy to be reasonable and ruled that one test of reasonableness is whether the rule was promulgated to regulate a problem or to further the Company's legitimate interests. Here there clearly was. It should be noted that simply saying that a rule is designed to regulate attendance and that it is therefore in furtherance of a legitimate interest is not enough on its own to show that a rule is reasonable. See *Federal Home Products*, 92 LA 898 (Robinson 2005). There must also be a showing that the rule will not impose undue hardships on the affected employees. Here again, employees have options and can take other accrued time to cover unexpected absences. Moreover, there are provisions in the new policy that make it easier to deal with them, i.e. by making vacation easier to use and by eliminating the requirement of the use of a minimum number of days and the 4-hour minimum increment to take it. These are but a few examples of how the policies differ but the import is clear – the policy on its face does not impose such hardships on the employees that it must be found to be unreasonable on its face on these facts.

AWARD

The grievance is DENIED.

Dated: March 16, 2007

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Jeffrey W. Jacobs, arbitrator

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